SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No......

STATE OF WASHINGTON, *Petitioner*
(Appellant below)

vs.

INLAND EMPIRE REFINERIES, INC., *Respondent*
(Respondent below)

MONTANA HEADLIGHT OIL COMPANY, A CORPORATION, AND GREAT NORTHERN RY. CO., A CORPORATION, *Interveners*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I:

OPINION OF COURT BELOW

The majority and dissenting opinions of the Supreme Court of the State of Washington (Appendix) are reported in 103 Wash. Dec. 573, 101 P. (2d) 975 (1940). The case has not yet been officially reported.

II:

JURISDICTION

The jurisdiction statement in the petition (*ante* p. 4) contains a summary statement of the petitioners position

in regard to the jurisdiction of this court. Petitioner, however, requests the indulgence of the court in order that he may further expand the jurisdictional grounds, and a close analysis of the decision is necessary in order to establish that this court has jurisdiction by virtue of the fact that there are actually no substantial state grounds upon which the decision may be supported.

THE CLASSIFICATION BETWEEN DISTRIBUTORS OF PETROLEUM PRODUCTS AND DISTRIBUTORS OF HARD FUELS WAS DECLARED UNCONSTITUTIONAL BECAUSE VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

In the first portion of the opinion (Appendix A) reference is made to both the Federal and State constitutions. This was for the purpose of indicating that the Supreme Court is willing to permit classification in excise taxation, if such classification be not arbitrary or capricious. The office of rendering the classification unconstitutional was confined to the federal constitutional clause, which alone was applicable to that portion of the Washington statute imposing burdens on the distributor of petroleum products. It cannot be overlooked that the 14th amendment to the federal constitution is worded differently than the privileges and immunities clause of Art. I, Sec. 12, of the state constitution, and therefore has a different operative effect. The respective provisions are as follows

Fourteenth amendment to the federal constitution: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Art. I, Sec. 12, of the state constitution: "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

As was indicated in the jurisdictional statement (*ante* pp. 6-7) the 14th amendment to the federal constitution is a general provision extending alike to statutes granting privileges or imposing burdens, whereas the state constitution only operates to prevent the granting of privileges and does not prevent the imposition of burdens. A taxing statute of the nature here involved, imposes burdens, and does not grant privileges, therefore is within the scope of the federal constitution, not the state constitution. Washington cases dealing with the two constitutions have been concerned with the problem of classification (in which both constitutions have the same operative effect) and not with the problem of the basic and fundamental operative scopes of the statute.

Petitioner respectfully cites to this court the following cases from Washington, Oregon, California, and Indiana which recognize that a statute which expressly prohibits the unequal granting of privileges is not broad enough to prohibit the unequal imposition of burdens.

In *State v. Vance,* 29 Wash. 435, 458, 70 Pac. 34, defendant attacked a statute on grounds that it violated the privileges and immunities clause of the state constitution. In disposing of this contention the court said:

"No privilege or immunity, within the meaning of the constitution, has been granted to them under the

act under consideration. The performance of a duty only has been imposed on them as officers of the court. Just as if the legislature had imposed the duty of nominating such commissioners upon the clerk of the court and the sheriff. * * * "

A similar attack was made in *In re O'Neil*, 41 Wash. 174, 185, 83 Pac. 104, where it was alleged that an act imposing regulations upon the ticket brokerage business violated the privileges and immunities of the state constitution. The supreme court again reached the same conclusion:

"It is further argued that the act is objectionable in that it denies to the appellant the equal protection of the laws. It is claimed that it grants special privileges to railroad companies which are not enjoyed by other citizens. *Cases we have cited hold that such a law does not grant special privileges, but that it rather imposes a burden upon railway companies,* in that it limits the authority to sell tickets to the agent of the carrier appointing him, requires that the railroad company shall provide him with a certificate of authority, that no others shall sell transportation, and compels the company to redeem unused tickets. In view of all the requirements placed upon the railroad companies, we do not think it should be said that the act confers special privileges within constitutional prohibition. It, in effect says to railroad companies, You must duly commission all persons who sell your transportation; no others shall purchase it, and you shall redeem all unused transportation." (Italics ours.)

The following cases are authority for the proposition:

Ex parte Gerino, 143 Cal. 412, 414-416, 77 Pac. 166;
Fry v. State, 63 Ind. 552, 560, 30 Am. Rep. 238;
Ferner v. State, 151 Ind. 247, 249-250, 51 N. E. 360;
State ex rel. Gibson v. Richardson, 48 Ore. 309, 316, 85 Pac. 225.

THERE IS NO EVIDENCE TO SUPPORT THE FINDING THAT THE STATUTE UNREASONABLY DISCRIMINATED BETWEEN DISTRIBUTORS OF PETROLEUM PRODUCTS AND DISTRIBUTORS OF HARD FUELS, OR THAT THE CLASSIFICATION OF DISTRIBUTORS INTO THE TWO GROUPS IS UNREASONABLE.

The state court found that the tax upon the "user" of petroleum products, and not on the users of other fuel, constituted an arbitrary classification. The court inadvertently considered the tax as a consumers tax, or a users tax, consequently that portion of the opinion in which the tax is so treated should be disregarded as not furnishing a substantial ground upon which to invalidate the tax as a distributors tax. This position is emphatically proclaimed by the Washington Supreme Court itself, for on the same day the instant case was decided, the court, in the case of *Great Northern Railway Company v. Cohn,* 103 Wash. Dec. 591, 101 P. (2d) 985, (appendix B) directly held that the 1939 statute was not applicable to the Great Northern Railway Company because the Company used or consumed the fuel oil, and was not engaged in the business of distributing petroleum products. That the tax was levied on the distributor and not on the consumer was also established by the case of *State v. Fidelity & Deposit Co. of Maryland,* 194 Wash. 591, 78 P. (2d) 1090, which dealt with an earlier but similar statute.

It is clear that there cannot be a discrimination against the users of petroleum products for the reason that no tax is levied upon the users. While the users of the fuel oil may have to bear the ultimate financial

burden of the tax just as the consumers must bear the burden of nearly all taxes in the form of increased prices, the discrimination against which the equal protection clause operates is not of this nature. The equal protection clause is concerned with the direct incidence of the tax as imposed by the statute. The Supreme Court of the United States has adopted the view, with which the Supreme Court of the State of Washington has not expressly differed, that an excise tax of the type here involved cannot as a tax, be passed on.

Lash's Products Co. v. United States, 278 U. S. 175, 73 L. Ed. 251, 49 S. Ct. 98.

See also,

Shearer v. Commissioner of Internal Revenue, 48 F. (2d) 552 (C. C. A. 2d, 1931).

The jurisdiction of this court to review a state decision ignoring the true operation of the state statute under consideration was established in *St. Louis Southwestern Railway Company v. Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 35 S. Ct. 99, where it was held:

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." (Citation of authorities.)

See also:

Home Insurance Company v. New York, 134 U. S. 594, 33 L. Ed. 1025, 10 S. Ct. 593;

Anderson v. Forty-Two Broadway Company, 239 U. S. 69, 60 L. Ed. 152, 36 S. Ct. 17;

Texas Co. v. Brown, 258 U. S. 466, 66 L. Ed. 721, 42 S. Ct. 375;

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297, 43 S. Ct. 125;

Educational Films Corporation v. Ward, 282 U. S. 379, 75 L. Ed. 400, 51 S. Ct. 170.

THE PRESENCE OF COMPETITION ALONE CANNOT BE SUFFICIENT TO RENDER A CLASSIFICATION OTHERWISE VALID, UNREASONABLE AND VOID.

This court has clearly established that for the purposes of the equal protection clause, competition alone is insufficient to require that all competitions be included in the same classification for excise tax legislation.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, 43 S. Ct. 83;

Lawrence v. State Tax Commission of Miss., 286 U. S. 276, 76 L. Ed. 1102, 52 S. Ct. 556;

Union Bank & Trust Company v. Phelps, 288 U. S. 181, 77 L. Ed. 687, 53 S. Ct. 321.

Washington Supreme Court has never considered the presence of competition alone as decisive.

McNight v. Hodge, 55 Wash. 289, 104 Pac. 504;

Allen v. Bellingham, 95 Wash. 12, 163 Fed. 18;

Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837;

Garretson Co. v. Robinson, 178 Wash. 601, 35 P. (2d) 504.

III:

STATEMENT OF THE CASE

A summary of the matter involved has been set forth in the accompanying petition (*ante* p. 2).

IV:

SPECIFICATION OF ERRORS

I: Respondent respectfully submits that the Supreme Court of the State of Washington erred in holding that Laws of 1939, Chap. 186, violated the equal protection clause of the fourteenth amendment to the Federal Constitution.

II: Respondent respectfully submits that the Supreme Court of the State of Washington erred in holding that Laws of 1939, Chap. 186, violated the commerce clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

III: Respondent respectfully submits that the Supreme Court of the State of Washington erred in affirming the judgment of the Superior Court in favor of the defendant and the interveners and in holding Laws 1939, Chap. 186, unconstitutional in its entirety.

V:

ARGUMENT

The brief, which has been mainly devoted to the jurisdiction problem, will be direct and concise on the merits.

I

THE IMPOSITION OF AN EXCISE TAX UPON THE DISTRIBUTOR OF PETROLEUM PRODUCTS DOES NOT ARBITRARILY DISCRIMINATE AGAINST THEM IN FAVOR OF DISTRIBUTORS OF OTHER FUELS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The one proposition that can be derived from the numerous cases dealing with classification in tax legisla-

tion, is that the courts are willing to permit classifications that are reasonable, and to this end sanction wide latitude in the classification. The leading case sustaining this proposition is *Bell's Gap Railroad Company v. Pennsyvania*, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. 533, wherein the court stated that:

"The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which

every State in one form or another, deems it expedient to adopt."

In *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. Ed. 1139, 41 S. Ct. 606, the State of New Mexico levied a sales tax of two cents a gallon on distributors of gasoline. In the face of an attack on constitutional grounds the court found "no reason to doubt the power of the State to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use; * * * "

Similar to the instant case, was the case of *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. Ed. 237, 43 S. Ct. 93, where a property tax was levied on anthracite coal and not on bituminous coal. In sustaining the classification, the court said:

"The fact of competition may be accepted. Both coals, being compositions of carbon, are of course capable of combustion and may be used as fuels, but under different conditions and manifestations; and the difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The difference between them are a just basis for their different classifications; * * * "

Other cases supporting classifications under circumstances wherein the difference in the classes are less marked than in the instant case include:

Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310;

A. Magnano Co. v. Hamilton, 292 U. S. 40, 78 L. Ed. 1109, 54 S. Ct. 599.

Cases dealing with reasonable classifications of course are legion, and the citation of a great number of them here would serve no purpose other than to illustrate that the courts are lenient, and will in each case search for differences in the class in order that a classification can be sustained as reasonable. Petitioner advances that there is a difference between petroleum products on the one hand, and hard fuels, such as coke, coal, sawdust, and hog fuel on the other, and that a classification based on those differences satisfies every test of a reasonable classification, and that it cannot be said that the classfication is unreasonable, arbitrary, or capricious in violation of the 14th amendment to the Federal constitution.

II

THE TAX IS NOT A BURDEN ON INTERSTATE COMMERCE.

The rule is well established that an activity such as here taxed by the state, after the subject of the tax has come to rest within the State there is no violation of the commerce clause.

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388;

Sonneborn Bros. v. Curston, 262 U. S. 506, 43 S. Ct. 643;

Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606;

Vancouver Oil Co. v. Henneford, 183 Wash. 317.

We appreciate the principle that a state cannot exercise a power to tax the products of other states introduced into it, so as to discriminate against the products of other states, and in favor of its own products.

Welton v. Missouri, 91 U. S. 275;

Wood v Maryland, 12 Wall. 418;
Hinson v. Scott, 8 Wall. 148;
Woodruff v. Purham, 8 Wall, 123;
Darnell & Son v. Memphis, 208 U. S. 113;
Baldwin v. Seelig, 294 U. S. 511.

We also realize we cannot here seek a review of the State Court's construction of a local law. But we do insist, however, that if the act contains an invalid exemption, that exemption should be eliminated and the remainder of the act allowed to stand. This is particularly true in view of the severability clause contained in the act. (Section 21.)

The case of *Utah Power & Light Company v. Pfost*, 286 U. S. 165, involved the validity of a state statute imposing a privilege tax on the generation and transmission of electrical energy, but containing a provision exempting electricity used for pumping irrigation water, which exemption, it was claimed, rendered the whole act void as discriminatory.

This court held, however, in view of the presence there, as here, of a severability clause, that if the exemption resulted in unlawful discrimination, the exemption clause could be eliminated and the remainder of the act could stand.

For the reasons urged we respectfully pray that the petition for a writ of certiorari be granted.

SMITH TROY,
Attorney General of the State of Washington,

JOHN E. BELCHER,
Assistant Attorney General of the State of Washington.

For Petitioner.